United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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To Be Argued By:

David J. Fine

United States Court of Appeals

For the Second Circuit

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P/S

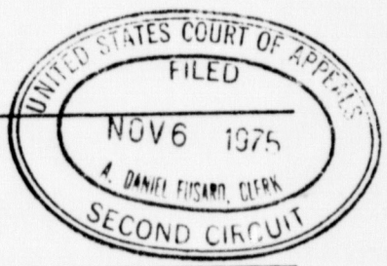
MASIA A. MUKMUK, also known as
SYLVESTER CHOLMONDELEY,

Appellant,

v.

COMMISSIONER OF THE DEPARTMENT OF CORRECTIONAL SERVICES; J. EDWIN LaVALLEE, Superintendent of the Clinton Correctional Facility; VINCENT R. MANCUSI, Superintendent of the Attica Correctional Facility; JOHN L. ZELKER, Superintendent of the Green Haven Correctional Facility,

Appellees.



REPLY BRIEF FOR APPELLANT

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Appellees.

Docket No. 74-1504

REPLY BRIEF FOR APPELLANT

POINT I

DEFENDANTS' ACTIONS WERE UNCONSTITUTIONAL WHEN TAKEN.

Defendants argue (Appellees' Brief at 22-32), that even if their actions against plaintiff were unconstitutional by current standards, the actions were not unconstitutional at the time they were taken. This argument misinterprets prison litigation in this Circuit and misreads plaintiff's complaint. Moreover, it rests on the mistaken premise that all constitutional decisions affecting prison administration are not retroactive.

A. Black Muslim Litigation

Defendants acknowledge (Appellees' Brief at 24) that

as early as July 31, 1961, this Court held that it was unconstitutional to subject Black Muslim prisoners to solitary confinement because of their religious beliefs. Pierce v. LaVallee, 293 F.2d 233 (2d Cir. 1961). Defendants imply that this ruling was undermined by the fact that on remand the prisoners were denied recovery. Pierce v. LaVallee, 212 F.Supp. 865 (N.D. N.Y. 1962), aff'd, 319 F.2d 844 (2d Cir. 1963). Defendants neglect to state that the basis for the denial of relief was the trial court's finding "after a very extensive trial" that the prisoners "failed to establish that their punishment resulted from their religious beliefs." 319 F.2d at 844-845. In the instant case, of course, there has been no trial, and no finding that plaintiff has failed to prove his claim that he was punished in violation of his First Amendment rights. The question is whether plaintiff's allegations are legally sufficient, and under Pierce v. LaVallee, 293 F.2d 233 (2d Cir. 1961) and succeeding cases, there is no question that they are.

Sostre v. McGinnis, 334 F.2d 906 (2d Cir. 1964) also cited by defendants, only confirms the point. Defendants prefer to focus (Appellees' Brief at 25-27) on those parts of the case which speak of the power of prison authorities to supervise and limit the activities of Black Muslim inmates. Under a more objective reading, the opinion stands for the principle that a prison official must strike a balance between the undeniable constitutional rights of inmates and the legitimate

claims of prison discipline. This principle is reflected in an excerpt from 62 Col. L. Rev. 1488, 1503-04 (1962) quoted by the Court and reproduced at page 26 of appellees' brief:

> "Once the imminence of danger is apprehended and proved, it would seem preferable to give the warden the discretion his competence warrants, and uphold all disciplinary measures reasonably necessary to meet the threatening situation " (emphasis added).

In the instant case, there is no proof that defendants' severe punishment of plaintiff was in response to a threatening situation and a fortiori no proof that the punishment was "reasonably necessary" to meet a threatening situation if one existed. On the contrary, the very length of plaintiff's confinement to punitive segregation shows that it represented not a reasonable attempt to meet a specific threatening situation but rather a gross overreaction in plain violation of plaintiff's constitutional rights.

B. Retroactivity

Defendants imply (Appellees' Brief at 22-23) that Wolff v. McDonnell, 418 U.S. 539 (1974) and Cox v. Cook, 420 U.S. 734 (1975) stand for the rule that all constitutional decisions concerning prison governance are not retroactive. In fact, the two cases stand for no such principle. The Court's holding in Wolff was limited to a decision that the new procedural rules which the case established were not to be retroactive. 418 U.S.

at 573-574. The Court said nothing about other types of constitutional decisions affecting prison administration. Moreover, the rationale for the Court's decision in Wolff was that a ruling of retroactivity would be a great burden "on the administration of all prisons in the country," affecting literally thousands of hearings. Id. This rationale simply does not apply to such constitutional rulings as that a prisoner may not be punished for conduct protected by the First Amendment.

The Court's two-page per curiam opinion in Cox v. Cook, 420 U.S. 734 (1975)adds nothing to Wolff. It holds only that in view of the ruling in Wolff that the new procedural standards were not to be applied retroactively, a prison official cannot be liable in damages for a pre-Wolff failure to adhere to those standards.

Contrary to defendants' position that all consitutitional decisions affecting prison administration must have prospective effect only, the Supreme Court has made it plain that a ruling about the retroactivity of a decision must be made on a case-by-case basis:

> "[W]e must...weigh the merits and demerits in each case by looking to the prior history of the rule, its purpose and effect, and whether retrospective operation will further or retard its operation." Linkletter v. Walker, 381 U.S. 618, 629 (1964).

If anything, retroactivity is to be regarded, as it is throughout the common law, as the rule rather than the exception.

Before any decision can be denied retroactively, it must first be determined that the decision establishes "a new principle of law, either by overruling clear past precedent on which litigants may have relied...or by deciding an issue of first impression whose resolution was not clearly foreshadowed." Chevron Oil v. Huson, 404 U.S. 97, 106 (1971); accord, Hanover Shoe v. United Shoe Machinery, 392 U.S. 481, 496 (1968). As demonstrated below, defendants' claims of non-retroactivity fail to meet this threshold standard. Even assuming that they did meet this standard, however, defendants' claims would still fail under the criteria established by Linkletter v. Walker, 381 U.S. 618 (1964) and its progeny.

C. Wright v. McMann

Defendants maintain (Appellees' Brief at 28) that it "was not until this Court's first decision in Wright v. McMann, 387 F.2d 519 (2d Cir.) on December 19, 1967 that a strip cell was held to constitute cruel and unusual punishment." This statement is grossly misleading because it implies that the ruling in Wright emerged ex nihilo. In fact, this Court's decision was based (see 387 F.2d at 525-526) on a standard of cruel and unusual punishment established years before in such cases as Weems v. United States, 217 U.S. 349 (1910) and Trop v. Dulles, 356 U.S. 86 (1958). See also Robinson v. California, 370 U.S. 660 (1962)(making it clear that the Eighth Amendment's

prohibition against cruel and unusual punishment applied to the states). Moreover, the standard was sufficiently well defined that this Court was moved to state it had "no hesitancy" in reaching its decision. 387 F.2d at 525.

Thus, defendants' argument that Wright is not retroactive must be rejected simply because Wright did not establish "a new principle of law." There was no prior decision on which prison officials could have relied in subjecting a prisoner to the type of confinement Wright alleged.

It should also be noted that there is nothing in the Wright opinion itself that suggests that the Court meant it to have only prospective effect. Indeed, when the case came back to the Court after the remand, it demonstrated that it intended its original decision to be retroactive by upholding a judgment for damages against Warden McMann. Wright v. McMann, 460 F.2d 126, 134-135 (2d Cir. 1972).

Finally, under the test established by such cases as Linkletter v. Walker, 381 U.S. 618 (1964), there are strong policy considerations in favor of Wright's retroactivity. One of the purposes of the Wright decision was to insure that prisoners who had been subjected to debasing conditions of confinement received some compensation, however inadequate, for their injury. When this policy is weighed against the minor burdens occasioned by a finding of retroactivity, there can be no question that retroactivity is demanded.

D. Sostre v. McGinnis

In asserting (Appellees' Brief at 30-32) that Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971) is not retroactive, defendants slide over the fact that Sostre stands for not one but several principles on which plaintiff relies. The most important of these for purposes of plaintiff's complaint is that prison officials may not punish an inmate for his political beliefs or for the mere expression of those beliefs. 442 F.2d at 189-190, 202-203. With respect to this principle, the question of retroactivity does not even arise because it was not "a new principle of law." See Chevron Oil v. Huson, 404 U.S. 97, 106 (1971); Hanover Shoe v. United Shoe Machinery, 392 U.S. 481, 496 (1968). As we showed earlier, this Court had foreshadowed this aspect of Sostre long before in Pierce v. LaVallee, 293 F.2d 233 (2d Cir. 1961) and Sostre v. McGinnis, 334 F.2d 906 (2d Cir. 1964). See also Cooper v. Pate, 378 U.S. 546 (1964) (unlawful to withdraw prisoner's privileges because of his religious faith); Lee v. Washington, 390 U.S. 333 (1968) (unlawful to segregate prisoners by race).

There was no decision prior to Sostre which could have justified prison officials in believing that the law permitted them to punish inmates for their political beliefs or the expression of those beliefs.

The only aspect of the Sostre decision that does raise the question of retroactivity is the ruling that a prisoner

cannot be subjected to substantial deprivations unless such action is

> "at least . . . premised on facts rationally determined. This is not a concept without meaning. In most cases it would probably be difficult to find an inquiry minimally fair and rational unless the prisoner were confronted with the accusation, informed of the evidence against him . . . and afforded a reasonable opportunity to explain his actions." 442 F.2d at 198.

Defendants maintain that the ruling of non-retroactivity which the Supreme Court applied to the procedural standards established by Wolff v. McDonnell, 418 U.S. 539, 573-574 (1974) also applies to the less stringent procedural standards established earlier by Sostre. But, as defendants acknowledge (Appellees' Brief at 32), this Court, while stopping short of an express ruling, intimated a strong justification for reaching the opposite conclusion in Williams v. Vincent, 508 F.2d 541, 545 n. 10 (2d Cir. 1974):

> "We note . . . that in Wolff the Supreme Court stated that although the new due process requirements established in that case related to the integrity of the fact-finding process, it did not think that error had been so pervasive under the old procedures (such as those required under Sostre) to warrant the costs which would result from invalidating prior disciplinary determinations where the safeguards now required under Wolff had not been applied. In contrast, where the very minimal safeguards required by Sostre have not been met, the possibility of error is substantially greater and the interests in going back are that much stronger."

Defendants argue that the Supreme Court's opinion in Cox v. Cook, 420 U.S. 734 (1975) somehow decides the retroactivity issue in their favor, but there is nothing in the opinion that even remotely alludes to the issue. Far more pertinent to the question is the Supreme Court's statement in Williams v. United States, 401 U.S. 646, 653 (1970) that where

> "the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactivity."

When this principle is put together with this Court's observation in Williams v. Vincent that a failure to observe the minimal procedural standards established by Sostre creates a great risk of error in the prison fact-finding process, the argument for retroactivity becomes irresistable.

POINT II

DEFENDANTS ARE NOT SHIELDED FROM LIABILITY BY A DEFENSE OF GOOD FAITH.

A. A good faith defense is, as a matter of law, unavailable to prison officials who have unconstitutionally subjected an inmate to prolonged punitive segregation.

Any analysis of the good faith defense must begin with the recognition that there is nothing in the language of 42 U.S.C. § 1983 which acknowledges the defense. The statute simply declares that "every person" who under color of state law "subjects or causes to be subjected" any "person within

the jurisdiction" of the United States "to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured. . . ." In fact, the good faith defense is entirely the creation of the courts.

The sole justification for the courts' creation of the good faith defense is summarized by the statement in Pierson v. Ray, 386 U.S. 547, 554 (1967) that "[t]he legislative record [of the enactment of 42 U.S.C. § 1983] gives no clear indication that Congress meant to abolish wholesale all common-law immunities." Accordingly, courts have felt justified in reading 42 U.S.C. § 1983 against the background of the common law of torts and in particular against the background of the fact that good faith was recognized as a defense to certain common law torts.

With this in mind, it is plain that if the judicial interpretation of 42 U.S.C. § 1983 is to retain its integrity, it must be recognized that good faith is generally not a defense to a civil rights action, and that Pierson authorizes departure from that rule only where such a defense existed at common law. In Pierson itself, the Supreme Court relied on the common law rule that "a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved." 386 U.S. at 555.

Thus, in determining whether the good faith defense should be made available to prison officials who unconstitutionally

subject an inmate to prolonged punitive segregation, the first question is whether the defense would have been recognized at common law. The closest analogue to unjustified disciplinary confinement is the tort of false imprisonment. This is apparent from the types of compensation to which a victim of false imprisonment was entitled, which are the same types of compensation deserved by a prisoner who has been subjected to prolonged punitive segregation:

> "The [complainant] is entitled to compensation for his loss of time, for physical discomfort or inconvenience, and for any resulting physical illness or injury to his health. Since the injury is in large part a mental one, he is entitled to damages for his mental suffering, humiliation and the like." Prosser, The Law of Torts ("Prosser") § 11 at p. 43 (4th ed. 1971) (footnotes omitted).

No good faith defense to the tort of false imprisonment was recognized at common law. Restatement (Second) of Torts § 44 (1965); Prosser § 11 at 48. Accordingly, no good faith defense should be accorded to prison officials sued under the Civil Rights Act for unconstitutionally subjecting a prisoner to disciplinary confinement.

The same conclusion is mandated by considerations of policy. The primary policy reason for recognizing a defense of good faith is to insure the robust execution of functions which are essential to the public good. Thus, it is desirable to accord a police officer the defense of good

faith so that he will not be intimidated from making arrests. See Pierson v. Ray, 386 U.S. 547 (1967). Similarly, it is desirable to accord the defense to public school officials so that they will not be deterred from vigorously carrying out their essential duties. See, Wood v. Strickland, 420 U.S. 308 (1975). See also Scheuer v. Rhodes, 416 U.S. 232 (1974). In contrast to the functions at issue in Pierson, Wood, and Scheuer, however, the practice plaintiff challenges here is not essential to the public good and not worthy of protection. Indeed, the prolonged confinement of inmates to punitive segregation is a particularly gratuitous form of "prison discipline." This is demonstrated by how easily New York's prisons have been able to get along without it under the command of new laws and regulations which now make impossible the type of confinement to which plaintiff was subjected. N.Y. Correction Law § 137; 7 N.Y.C.R.R. §§ 251.6, 300.1-304.4.

This is not to suggest that policy requires that prison officials never be accorded a good faith defense. It is rather to emphasize that certain types of prison discipline, while not unconstitutional per se, are nevertheless not so essential to the public good that they deserve the protection of a good faith defense. This is especially true since the granting of a good faith defense may well entail denial of much deserved compensation to a prisoner who has suffered severe injury.

B. Assuming that a good faith defense were available to defendants, they could not qualify for its protection.

To come within the protection of a good faith defense, defendants must meet two requirements. First, they must have acted in the good faith belief that the conduct complained of was lawful. Second, their belief must have been reasonable. Wood v. Strickland, 420 U.S. 308 (1974); Scheuer v. Rhodes, 416 U.S. 232 (1974).

In demonstrating above that defendants' actions against plaintiff were clearly unconstitutional when taken, we actually demonstrated at the same time that defendants could not have reasonably believed that their actions were lawful. The standard of reasonable belief is a stringent one. As the Supreme Court stated in Wood v. Strickland, 420 U.S. 308, 322 (1975), an official who would take advantage of the "special exemption from the categorical remedial language of §1983" must "be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges." Applying this principle here, it is apparent that defendants are not entitled to a defense of good faith as a matter of law.

Assuming, however, contrary to fact, that it is possible for defendants to have had a reasonable belief that

their conduct was lawful, defendants are still not entitled to a good faith defense on the present state of the record. At the very least, a trial would be necessary to determine whether defendants did in fact have such a reasonable belief in good faith. Defendants attempt to counter this obvious fact by maintaining (Appellees' Brief at 34) that their good faith is established as a matter of law: "The New York prison system has been the subject of judicial scrutiny for well over a decade," declare defendants, and "[a]t no time when new constitutional standards were enunciated by this Court or the District Courts did any court find that any prison official had acted in bad faith." Putting aside the issue of whether this extraordinary statement is accurate, it need only be pointed out that rejecting plaintiff's claims on the basis of issues of fact decided in cases to which he was not a party, would itself be a violation of plaintiff's constitutional right to due process.

POINT III

PLAINTIFF SHOULD NOT BE DENIED COMPENSATION FOR THE SEVERE INJURY HE ALLEGES ON ACCOUNT OF TECHNICAL DEFECTS IN HIS PLEADING OR DELAY IN THE PROSECUTION OF THE ACTION.

Plaintiff's complaint alleges that in violation of his constitutional rights he was subjected to debasing and dehumanizing injury at the hands of New York's correctional institutions. Defendants would deny him compensation for that injury on the basis of defects in his pleading and delay in the prosecution of this action. It is repugnant to justice to reject plaintiff's claims on these technical grounds.

A. Alleged Defects in Pleading

Defendants protest plaintiff's failure to identify by name the Commissioner of Correction who is listed as a defendant in the complaint (Appellees' Brief at 8, 36). However, they do not suggest any way in which the absence of the Commissioner's name caused him prejudice. They do not and cannot claim that there was any ambiguity in the identification or that Commissioner McGinnis failed to have notice of the suit. Thus, while the absence of McGinnis's name in the caption may have been a technical violation of Rule 10 of the Federal Rules of Civil Procedure, it is certainly not a valid basis for relieving him of liability. This is especially true because plaintiff's proposed second amended complaint -- which, as we demonstrate below, the district court wrongfully refused plaintiff permission to file -- cures any defect.

Defendants also protest that in several instances, plaintiff attacks action taken against him by a correctional institution despite the fact that his complaint fails to name as a defendant any person who was an official of that institution at the time the actions were taken (Appellees' Brief at 8-13, 17-18, 35-36). For example, defendants point out that while plaintiff challenges his confinement to punitive segregation at Attica from March 18, 1965 to March 31, 1966, he does not name as a defendant any person who was an official at Attica at the time plaintiff was first placed* in segregation (Appellees' Brief at 8-9).

What defendants neglect to say is that plaintiff's proposed second amended complaint does name as defendants nearly all of the critical persons omitted as defendants in the complaint dismissed by the district court. Thus, if the

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* Although plaintiff's complaint does not name as a defendant the person who was superintendent of Attica between March and September 1965, it does name Vincent Mancusi, who was superintendent there from September 23, 1965 to March 29, 1972. Thus, since plaintiff is challenging his continued confinement to segregation at Attica, it must be noted that the person who was responsible for six months of that confinement is named as a defendant.

district court had permitted plaintiff to file his proposed complaint, the defects which defendants point out would have been cured. Consequently, defendants claim that plaintiff is not entitled to recovery for action with respect to which he has not sued an appropriate party, hinges on the validity of the district court's refusal to allow plaintiff to file his proposed complaint.

B. The District Court's Wrongful Refusal to Permit the Filing of an Amended Complaint

In denying plaintiff leave to file his proposed complaint, the district court stated:

> "The proposed amended complaint, also dated October 30, 1973, which would be the third amended complaint in this action, simply sets forth in greater detail what is contained in the October 15, 1971 complaint, and in addition it lists more recent instances of alleged mistreatment. It appears from the plaintiff's disciplinary record that he has not lost any good time as a result of these most recent incidents, for which the plaintiff has usually been keeplocked for short periods. In view of the prior three complaints and the dilatory prosecution of this action by plaintiff, the court will not delay this action's disposition further by permitting another complaint to be filed." 369 F. Supp. at 250.

It is apparent from this passage and in particular from the statement that the proposed complaint "simply sets forth in greater detail what is contained in the October 15, 1971 complaint" that the court did not regard the amended

complaint as supplying any essential element lacking in the complaint already filed. On the contrary, the court stated that the proposed complaint merely expanded on the complaint already filed, and strongly implied that even if he permitted the filing of the proposed complaint, it would be subject to dismissal for the same reasons he was dismissing the October 15,1971 complaint.

The court's refusal to allow the filing of the proposed complaint must be interpreted accordingly. It is one thing for a court to prohibit the filing of a complaint which adds nothing to the previous complaint; it is quite another to prohibit the filing of a complaint which supplies crucial missing elements. The claim which defendants are asserting here -- namely, that plaintiff failed to name certain critical defendants in his complaint -- was not made before the district court. Consequently, the district court did not have the opportunity to pass upon the propriety of allowing the filing of the proposed complaint in light of the fact that the proposed complaint named critical defendants which the previous complaint did not name.

When the proposed complaint <u>is</u> interpreted in the light of the argument defendants are raising here, it is plain that the filing of an amended complaint should have been permitted. Rule 15 of the Federal Rules of Civil Procedure

provides that leave to amend a pleading "shall be freely given when justice so requires." In applying this standard, it is, first, necessary to consider the nature of the claims that would conceivably be foreclosed if the amendment were not allowed. As appellant's main brief demonstrates, the claims at issue here are of the utmost importance, alleging as they do the infliction of severe injury by public officials in violation of plaintiff's constitutional rights.

Second, one must evaluate the prejudice, if any, caused by the delay in making the amendment. Here the persons which the proposed complaint seeks to add as defendants stand to suffer minimal prejudice. Like the defendants named in the October 15, 1971 complaint, the additional defendants would be represented by the Attorney General. Indeed, in a very real sense, the Attorney General has been protecting the interests of the additional defendants from the beginning: In reviewing the history of this action, it is difficult to imagine how the Attorney General's conduct of the defense would have been any different had he formally been representing the additional defendants as well as the other defendants.

Moreover, the additional defendants cannot complain that their ability to adduce evidence in opposition to plaintiff's claims has been signficantly eroded by the passage of time. To

establish his case, plaintiff intends to rely primarily on documentary evidence. This documentary evidence is typified by the exhibits to appellant's main brief and the cumulative report of disciplinary action reproduced in the joint appendix. The additional defendants' ability to respond to arguments made on the basis of such evidence is essentially the same today as it was when the October 15, 1971 complaint was filed.

C. Alleged Dilatoriness in the Prosecution of this Action.

Defendants maintain that the district court correctly denied plaintiff leave to file his proposed complaint because of his "dilatoriness" in pressing the action (Appellees' Brief at 14-16). Indeed, defendants claim that plaintiff's "dilatoriness" is alone sufficient to justify denying him all relief (Appellees' Brief at 36). Plaintiff agrees that this case was not prosecuted as speedily as he would have liked. Indeed, the only party to have suffered, and suffered substantially, from that delay is plaintiff himself. It would be the cruelest irony if the delay should now serve as the justification for dismissing plaintiff's case altogether.

Plaintiff's prosecution of the present action can hardly be judged by the standards applied to commercial litigation. Plaintiff was a prisoner without funds. He was fortunate

enough to have counsel represent him. But the case as it developed required a great deal of time which counsel could not easily afford in view of the fact that she was not being compensated. Consequently, delay was inevitable. Moreover, there were various times during the course of the proceedings below when plaintiff thought it unwise to press the case because of fear of retaliation by prison authorities.*

The difficulties prisoners face in instituting and prosecuting suits has been recognized in the tolling provision to the statute of limitations which, until an amendment in 1974, New York granted to all persons under the disability of imprisonment. CPLR 208, McKinney's Consolidated Laws (1972 and 1975-76 Sup.). These difficulties have also been recognized in decisions giving plaintiffs in § 1983 actions the full benefit of this toll. Ortiz v. LaVallee, 442 F.2d 912 (2d Cir. 1971); Kaiser v. Cahn, 510 F.2d 282 (2d Cir. 1974). In the face of such recognition, it would be singularly inappropriate to penalize plaintiff, who was only released from prison in January 1975, for the "dilatory" prosecution of this action.

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* The delay in the perfecting of this appeal is explained by the fact that when Ms. Fisher, plaintiff's main counsel below, moved to Boston, new counsel had to be found. The process of finding new counsel was in itself time consuming. When new counsel were found, they needed a substantial amount of time to familiarize themselves with the case.

CONCLUSION

The judgment below should be reversed. As to those incidents where the liability of defendants is established as a matter of law by the record as it now stands, the case should be remanded for trial on the issue of damages alone. As to the other incidents, the case should be remanded for trial on both liability and damages. In addition, plaintiff should be granted permission to amend his complaint as he deems appropriate.

Dated: New York, New York
November 6, 1975

Respectfully submitted,

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